Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-240

JAMES ROBERT WALKER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO.

JAMES ROBERT WALKER,
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v.

STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, JAMES ROBERT WALKER, prays a Writ of Certiorari issue to review the Order of the Florida Supreme Court entered on the 30th day of May, 1979, denying Petition for Writ of Certiorari.

OPINIONS BELOW

The Order of the Florida Supreme Court denying Certiorari is set out verbatim in the Appendix hereto at Page 1A. The Order of the Second District Court of Appeal and Order Denying Rehearing are set out verbatim in the Appendix at pages 2A and 3A. The Order entered by the Trial Court denying Petitioner's Motion for New Trial is set out verbatim in the Appendix at page 4A.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to *Rule 19 1(a), Rules of the Supreme Court of the United States*, and *28 U.S.C. 1257(3)*, Petitioner having been deprived of his due process rights secured by the Constitution of the United States.

QUESTION PRESENTED

Does the refusal of the Trial Court to instruct the jury in a robbery case on each permissible lesser included offense violate a defendant's due process rights and deprive him of a fair trial, contrary to the guarantees of the *Fifth Amendment* and the *Sixth Amendment* to the *Constitution of the United States*?

CONSTITUTIONAL PROVISIONS INVOLVED

The *Constitution of the United States, Amendment V*, provides:

> " . . . no person shall be . . . deprived of life, liberty or property, without due process of law . . ."

The *Constitution of the United States, Amendment VI*, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

STATEMENT OF THE CASE

Petitioner, JAMES ROBERT WALKER, was charged and tried by jury in Highlands County, Florida, for "Robbery". Prior to the Court instructing the jury the defense requested instructions, inter alia, on "Attempt To Commit Grand Larceny" and "Attempt To Commit Petty Larceny". The requests were denied. Petitioner was found guilty as charged.

On Motion for New Trial the Court's refusal to instruct the jury on those lesser included offenses was again raised. (5A) The Motion was denied. (4A) Petitioner was thereupon adjudged to be guilty of Robbery and sentenced to a term of six months to fifteen years in prison.

Petitioner seasonably took his Appeal to the District Court of Appeal, Second District of Florida, presenting that Court with the question of whether or not the Trial Court erred in refusing to instruct the jury on the aforementioned lesser included offenses. That Appeal, however, was culminated in a per curiam Order affirming the action of the Trial Court. (2A) Petition for Rehearing was seasonably filed and denied. (3A)

Petitioner thereupon sought a Writ of Certiorari from the Florida Supreme Court on ground that the decision of the Second District Court of Appeal was in irreconcilable conflict with the existing case law. That effort, however, was denied by Order entered in the Florida Supreme Court on May 30, 1979. (1A)

WHY WRIT SHOULD ISSUE

That this cause may be in perspective, Florida law holds that the jury has the power and must be afforded the opportunity to grant a defendant a "pardon" of a serious offense by convicting him of a lesser one. *Silvestri v. State*, 332 So. 2d 351 (4th DCA 1976) In that context, Florida recognizes that the offense of "robbery" necessarily includes "larceny"; the former being but an aggravated form of the latter. *Arnold v. State*, 83 So.2d 105 (Fla. App. 1955)

It is clearly the height of absurdity to concede that a jury may convict a defendant of a lesser offense, yet decline to apprise the jury of their prerogative so to do! Indeed, assuming they were aware that they might return a verdict for the subject lesser offenses, nevertheless, the jurors were thereby invited to speculate at just what acts comprise the lesser offenses which they might consider. We respectfully assert that such omission is of constitutional magnitude! This very Court said in *Chimel v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that:

> " . . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

That observation clearly obtains here! To hold otherwise is to deny Petitioner due process of law and his fundamental organic right to trial by jury. This Court observed in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), that:

> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in Federal Court -- would come within the Sixth Amendment guarantee."

and

> "The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States."

Petitioner's constitutionally guaranteed right to a fair trial was here patently denied when the Court refused to apprise the jury of their prerogative to return a verdict for a lesser included offense as a "jury pardon", or of their obligation to do so if the facts would admit to a conviction for only a lesser offense.

The District Court for the Middle District of Florida addressed itself to the legal concept of "fairness" in *Brown v. Wainwright*, 459 F.Supp. 244 (MD Fla. 1978). That Court said:

> "The Fourteenth Amendment's guarantee of due process includes the right to a fair trial. There is no test of fairness which can be mechanically applied to every situation. However, *fairness is the*

'touchstone of due process.' " (Emphasis supplied)

Clearly, the indispensable element of fairness is here missing! Due process has been denied Petitioner, resulting in the deprivation of his constitutionally guaranteed right to a fair trial.

Courts have often addressed themselves specifically to the requirement that the jury be properly charged. Indeed, in *Kenion v. Gill*, 155 F.2d 176 (CCA, DC, 1946), the Court said:

> "It is *reversible error for the trial court to fail to define the various crimes involved in the Indictment, and to fail to define the elements of each,* to the extent necessary to permit the jury to apply the law to the facts." (Emphasis supplied)

In *Miller v. United States*, 120 F.2d 968 (10th Cir. 1941), the Court said:

> "The bars which guard *the right to a fair trial, such as is guaranteed by our Constitution, include . . . proper instructions to the jury. . . .*" (Emphasis supplied)

In that context, in *Williams v. United States*, 131 F.2d 21 (CCA, DC, 1942), the Court said:

> "A basic defect of the charge is failure to discuss and define the offenses included in the Indictment. . . . The jury was not told what assault with intent to rape is, nor how it is distinguished from rape. The Court at the conclusion of its charge was asked to instruct with regard to assault with intent to rape and simple assault. It then proceeded to tell the jury that it might convict of those offenses but *wholly failed to tell it of what those offenses consisted.*" (Emphasis supplied)

The Court went on to state that to approve the charge would be to:

> " . . . assume that jurors are wise in law; that they know the constituent elements of rape, and that they know what is an assault with intent to commit rape, that they know the full distinction between the two; *that they know the definitions of the lesser offenses embraced*; that they know all the circumstances under which a verdict of not guilty is proper; and that they know the proper application of the reasonable doubt criterion. Such an assumption violates the accepted division of functions between judge and jury. It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by ensuring impartiality. But *of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?*" (Emphasis supplied)

The question presented in the last sentence of the above

quote summarizes Petitioner's position here. Petitioner had a right to the jury's consideration of the requested lesser offenses of "Attempt To Commit Grand Larceny" and "Attempt To Commit Petty Larceny". He had a right to the jury's consideration of the lesser offenses either because the evidence would sustain no greater offense or under the theory of a "jury pardon". The fact that the Court did not apprise the jury of that obligation and prerogative denied Petitioner his due process rights and operated to deprive him of a fair trial! In that vein, the Fifth Circuit Court of Appeals, in *United States v. Wolfson*, 573 F.2d 217 (5th Cir. 1978), said:

> "The primary purpose of jury instructions is to define with substantial particularity the factual issues, and to *clearly instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them.* *** Accordingly, a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly points to the theory of his defense." (Emphasis supplied)

Of signal import in the cause sub judice, the Fifth Circuit, in *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967), said:

> "We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed, by the jury, are legally sufficient to render the accused

> innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that offense, *he dilutes the defendant's jury trial by removing the issue from the jury's consideration.*" (Emphasis supplied)

and

> "The jury did not have to believe the defenses, but *it should have been given the opportunity.*" (Emphasis supplied)

We respectfully urge that, as in the *Strauss* case, the jury sub judice did not have to believe or act upon instructions on the requested lesser included offenses, either on the theory that the evidence only supported a conviction for that degree of the offense or on a theory of a "jury pardon". Nevertheless, they should have been given the opportunity to consider them. The withholding of such information by the Court clearly is a denial of due process of law for its patent and fundamental unfairness. The unavoidable effect of that constitutional deprivation was to further deprive Petitioner of his organic right to a fair trial!

CONCLUSION

On the foregoing argument and authorities, we respectfully submit that it has been clearly demonstrated that Petitioner was deprived of his organic guarantees to due process of law and to a fair trial, and that this Petition for a Writ of Certiorari to the Supreme Court of Florida should

be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

ORDER DENYING PETITION FOR WRIT

SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 30, 1979

JAMES ROBERT WALKER,
Petitioner,

CASE NO. 55,629

v.

DISTRICT COURT OF APPEAL,
SECOND DISTRICT

STATE OF FLORIDA,
Respondent.

78-163

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur

ORDER AFFIRMING ACTION OF TRIAL COURT

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JULY TERM, A.D., 1978

JAMES ROBERT WALKER,
Appellant,

v. Case No. 78-163

STATE OF FLORIDA,
Appellee.

Opinion filed October 4, 1978.

Appeal from the Circuit Court for Highlands County;
Clifton M. Kelly, Judge.

Robert E. Pyle, Lake Alfred, and
Hayward H. Davis, Lake Placid,
for Appellant.

Robert L. Shevin, Attorney General, Tallahassee, and
Robert J. Landry, Assistant Attorney General, Tampa,
for Appellee.

PER CURIAM.

Affirmed.

GRIMES, C.J., and HOBSON and RYDER, JJ., Concur.

ORDER DENYING PETITION FOR REHEARING

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT

WEDNESDAY, NOVEMBER 8, 1978

JAMES ROBERT WALKER,
Appellant,

v. CASE NO. 78-163

STATE OF FLORIDA,
Appellee.

Counsel for appellant having filed in this cause a Petition for Rehearing Or, Alternately, To Certify Question and the same having been considered by the Court, it is

ORDERED that said Petition be and the same is hereby denied.

ORDER ON MOTION FOR NEW TRIAL DENIED

IN THE CIRCUIT COURT OF HIGHLANDS COUNTY, FLORIDA

STATE OF FLORIDA

vs. CASE NO. CR-76-266

JAMES ROBERT WALKER

ORDER ON MOTION FOR NEW TRIAL DENIED

AFTER CAREFULLY studying the briefs and examining *all cases* cited by counsel for the state and the defense and having compared them with the record sub judice, it does appear that the Defendant's Motion for a New Trial should be denied.

THIS COURT is necessarily concerned with the decision entered in the case of Moore vs. State, 341 So.2d 814 (Fla. 1977) but is of the opinion that the Defendant had a fair trial and if instructions on assault with intent to commit grand larceny and assault with intent to commit petit larceny should have been given, that such would have been a harmless error. See Delaine vs. State, 262 So.2d 644 (Fla. 1972) and Dobbert vs. State, 328 So.2d 433 (Supt. Ct. Fla. 1976). Accordingly, it is now

ADJUDGED that the Defendant's Motion for a New Trial is denied.

ENTERED at Sebring, Florida, this 12th day of December, 1977.

EXCERPT FROM MOTION FOR NEW TRIAL AND ARREST OF JUDGMENT

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT . . . . .
IN AND FOR
HIGHLANDS COUNTY, FLORIDA

CASE NO. CR76-266
76-1538-F

STATE OF FLORIDA

vs.

JAMES ROBERT WALKER, et al,
Defendants.

MOTION FOR NEW TRIAL AND ARREST OF JUDGMENT

The defendant, JAMES ROBERT WALKER, by his undersigned attorney, Hayward H. Davis, moves the court to grant a new trial and arrest of judgment in said cause and for grounds says:

***

7. That the court erred in refusing to give the defendant's request for an instruction on the lesser included offenses of Assault With Intent to Commit Grand Larceny, Assault With Intent to Commit Petty Larceny, Attempt to Commit Grand Larceny, and Attempt to Commit Petty Larceny.

***